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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the matter of)
)
HERBERT L. SCHOENBOHM)
Kingshill, Virgin Islands)
)
For Amateur Station and)
Operator Licenses)
)

WT Docket No. 95-11

TO: Administrative Law Judge
Edward Luton

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF HERBERT L. SCHOENBOHM

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Summary

The General Counsel remanded this case to the Administrative Law Judge for further hearings to determine whether Herbert L. Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction, loss of pension rights and ex parte communications, and to determine whether Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes. As shown in these proposed findings of fact and conclusions, the hearing record demonstrates, conclusively, that Schoenbohm told the whole truth concerning his felony conviction, loss of pension rights and ex parte communications. There were no misrepresentations, and Schoenbohm did not lack candor.

The second issue related to a tape recording of a transcript between Mr. Schoenbohm and another radio amateur. Analysis of the tape recording shows, conclusively, that the conversation was completely innocent. There was no discussion of any illicit access codes. Instead, the discussion dealt with the use of ordinary, public telephone numbers.

Mr. Schoenbohm has satisfied all of the issues. Accordingly, his license should be renewed.

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A p p e a r a n c e s

Thomas D. Fitz-Gibbon and Terrence E. Reideler on behalf of the Wireless Telecommunications Bureau; and Lauren A. Colby on behalf of Herbert L. Schoenbohm.

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF HERBERT L. SCHOENBOHM**

Herbert L. Schoenbohm ("Schoenbohm"), by his attorney, hereby submits his Proposed Findings of Fact and Conclusions of Law:

I. INTRODUCTORY STATEMENT.

1. On September 27, 1996, the General Counsel released a Memorandum Opinion and Order, FCC 96I-33 directing that a further hearing be held in this proceeding on the following issues:

(c) (1) To determine whether Herbert L. Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction, loss of pension rights, and ex parte communications;

(c) (2) To determine if Herbert L. Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes.

2. A further hearing was, in fact, held on the above issues on April 1, 1997; the record was closed; and the Administrative Law Judge directed that proposed findings be filed no later than May 12, 1997 (Tr. 138).

II. FINDINGS OF FACT.

A. Issue (c) (1).

1. In his testimony at the prior hearing in this proceeding, Schoenbohm responded to a question from his attorney which inquired, in substance, as to the nature of the counterfeit access devices, which were in Schoenbohm's possession. Counsel for Schoenbohm asked that question because, prior to the hearing, Schoenbohm specifically asked counsel to make it clear that he did not possess or use any mechanical, electro-mechanical, or magnetic access devices; that the only devices he had were telephone numbers in his mind. (Schoenbohm Ex. 8, pg. 1.)

2. Schoenbohm obtained these numbers under the following circumstances: Sometime in 1987, he learned of a service offered by Caribbean Automated Long Lines Service, "CALLS", which offered discounted prices on long distance telephone calls. He was interested in saving money on his phone bill, so he contacted a CALLS sales representative by telephone. She furnished him with a

six digit number which could be used to access the CALLS system. The procedure was to call a telephone number for the CALLS system. When the number answered, the customer would enter the six digit access number and this would allow him to then dial a long distance number through CALLS. CALLS kept a record of the customer use of the system, so that the customer could be billed. (Schoenbohm Ex. 8, pg. 1.)

3. Later, Schoenbohm decided to obtain CALLS access numbers for his wife and his son. Once again, these numbers were voluntarily furnished to him by CALLS personnel, so that, altogether, he had a total of three of these six digit numbers. (Schoenbohm Ex. 8, pg. 1.)

4. He used the numbers routinely to make long distance calls, assuming that he would be sent a bill by CALLS. However, no bill arrived. Instead, he learned from a friend that CALLS was having financial difficulties and that the owner of CALLS felt that Schoenbohm was somehow responsible for thousands of dollars of losses. As soon as Schoenbohm heard of this he immediately stopped using the CALLS system and made no further use of the CALLS numbers. Nevertheless, Schoenbohm was eventually indicted and convicted on the charges previously described in this FCC proceeding. (Schoenbohm Ex. 8, pg. 1.)

5. Schoenbohm has always thought it important, however, that he was not convicted of possessing or using any electrical or physical device. That is why he asked his attorney to make that clear at the hearing. Schoenbohm again affirmed that he did not

possess or use any "blue box",¹ slugs², counterfeit credit cards, or any other electronic, mechanical, or electro-mechanical devices, which either could be used or were used to make long distance telephone calls without paying for them. At the time Schoenbohm did have a Commodore 64 computer, equipped with a modem and dialer. However, he never used it to make any unauthorized telephone calls to anybody. His conviction was based solely upon the use or possession of three six digit numbers which had been given to him by CALLS. (Schoenbohm Ex. 8, pp. 1-2.)

6. With respect to his loss of pension rights, he did, in fact, lose all of his pension rights when he lost his job at the Virgin Islands Police Department. Schoenbohm's estimate that these rights amounted to at least \$150,000 was a very conservative estimate. If Schoenbohm had a pension paying at least \$10,000 per year, and lived for at least 15 years, he would have lost at least \$150,000. In truth, he has investigated and believes that his pension would have been somewhat more than \$10,000 per year. Furthermore, he believes it very likely that he will live more than 15 years after his retirement. Thus, he believes that his estimate of \$150,000 is actually less than the amount that he actually lost. (Schoenbohm Ex. 8, pg. 2.)

¹A "blue box" is an electronic circuit which was sometimes used by hackers in the 1970's and 1980's and connected across a telephone line to deceive the telephone network into allowing calls to be made without charging for them.

²A "slug" is a counterfeit coin sometimes used to deceive a pay telephone into thinking that money has been deposited when it has not.

7. It is true that Schoenbohm has now become employed by the Virgin Islands Government, and that he is now back in the system, so that his pension rights have been restored. The fact remains, however, that Schoenbohm lost his rights when he was fired from the police department and that his family and he had no way of knowing whether those rights would ever be restored. For two years, Schoenbohm had to confront the fact that the rights had been lost and that the loss could well be permanent. Thus, he felt that the loss of pension rights is a legitimate factor to be considered in assessing the suffering inflicted upon his family and himself as a result of his conviction. (Schoenbohm Ex. 8, pg. 2.)

8. Finally, with respect to the alleged violation of the "ex parte" rule, Schoenbohm pointed out that the conversation which forms the basis for the alleged violation of that rule was a "one-on-one" conversation, between Schoenbohm and a friend, Malcolm Swan. It was not a private conversation, because there is no way of guaranteeing the privacy of any conversation which takes place over the ham bands; other persons could always be eavesdropping. On the other hand, Mr. Swan and Mr. Schoenbohm were not participating in any network of any kind. The frequencies which they were using had just opened up after a period of time during which they had been dead, and no other hams ("breakers") had broken in to join in their conversation. Thus, in Schoenbohm's mind he was speaking to Malcolm as a friend, not to the world at large, and expounding on his newly discovered knowledge of the ex parte rules. Schoenbohm told Mr. Swan, in substance, that he, Schoenbohm, could

not write to politicians or people at the FCC without violating the rule, but that others could do so. Schoenbohm told him that he hoped that if others did, in fact, write, they would include certain information in their letters. However, he did not ask Mr. Swan to write to anybody, and Mr. Swan did not, in fact, write to anybody. (Schoenbohm Ex. 8, pp. 2-3.)

9. As Schoenbohm said before, he did not know at the time that the ex parte rule also prohibited him from encouraging other people to write to politicians on his behalf. If Schoenbohm had known of that portion of the rule, he would not have said what he said to Mr. Swan, lest it be misinterpreted as solicitation. So far as Schoenbohm can determine nobody ever wrote to any politician or to the FCC in support of his application. (Schoenbohm Ex., pg. 3.)

B. Issue (c) (2).

10. This issue seeks to determine whether, in a conversation with a fellow amateur, Schoenbohm discussed the use of unauthorized access codes to make long distance calls.

11. The conversation in question took place between Schoenbohm and two other amateurs, Dan Worely and Tony Benvenuti. At the time, Dan Worley was working for CALLS. A transcript of that conversation was received in evidence as Joint Exhibit 1 (Tr. 38). Schoenbohm agrees that the transcript is substantially accurate. (Schoenbohm Ex. 9, pg. 1.)

12. Some time in 1987, or thereabouts, Schoenbohm noticed that some businesses in Tortola in the British Virgin

Islands were advertising that they had local telephone numbers in the U.S. Virgin Islands. He knew that a gentleman by the name of Ackley had a so-called "YB system", which could be used illegally to transmit signals between the U.S. and British Virgin Islands and to enable merchants in the British Virgin Islands to be reached by calling a local number in the U.S. Virgin Islands. Schoenbohm checked with the telephone company in the U.S. Virgin Islands and learned that a block of telephone numbers had been assigned to Mr. Ackley. These telephone numbers were local calls within the U.S. Virgin Islands. (Schoenbohm Ex. 9, pg. 1.)

13. Schoenbohm began calling these numbers and listening on frequencies licensed to Ackley to determine whether a call to these numbers would activate Ackley's transmitters. During the conversation which was the subject of transcript, Schoenbohm called a number of these telephone numbers for the purpose of demonstrating to other amateurs that calling these numbers would, in fact, activate transmitters owned by Ackley or his company. Schoenbohm did this to encourage the other amateurs to pursue Ackley's illegal operations and to assist him in closing down these illegal operations. He also wrote a letter to Riley Hollingsworth at the FCC, specifically complaining about these illegal operations. (Schoenbohm Ex. 9, pg. 1.)

14. In any event, the telephone numbers which he dialed were simply telephone numbers which he picked out of the local yellow pages and/or numbers which were in the block of numbers which he learned from the telephone company would have been

assigned to Mr. Ackley or his company. These numbers were not "illicit" in any sense of the word. In Schoenbohm's opinion, it was perfectly legal for him to dial these telephone numbers and his purpose in doing so was to assist law enforcement in obtaining compliance with the FCC's Rules. (Schoenbohm Ex. 9, pp. 1-2.)

III. CONCLUSIONS.

A. Issue (c)(1).

1. Issue C(1) seeks to determine whether Schoenbohm made misrepresentations or lacked candor in his testimony about his felony conviction, loss of pension rights, and ex parte rules. As Schoenbohm testified, he asked his counsel to make it clear at the first hearing that he did not possess or use any mechanical, electro-mechanical or magnetic access devices that were used in connection with his conviction; that the only device he had were telephone numbers in his mind (F. 1). That was a perfectly legitimate distinction for Schoenbohm to make. Had he possessed or used any such mechanical devices, his crime would have been much more serious.

2. As it turns out, Schoenbohm obtained the telephone numbers which he used to make long distance calls in a perfectly legitimate manner. The numbers were voluntarily furnished to him by Caribbean Automated Long Lines Service (CALLS) (F. 2-4). Schoenbohm never used any mechanical device to make long distance calls, nor did he use a computer (F. 5). In drawing a distinction between the use of a mechanical device and the use of telephone numbers obtained in a legitimate manner, Schoenbohm did, of course,

seek to draw the Commission's attention to mitigate facts and circumstances. He had a perfect right to do that. See, Richard Richards, 1995 WL 170663 (Rev. Bd. 1995). It is only natural for a renewal applicant, who has been convicted of a crime, to mitigate and explain past behavior, and such explanations, if truthful, certainly do not constitute a "lack of candor". Here, Schoenbohm never denied that he used the telephone numbers; he merely pointed out that he did not use any mechanical devices, which was perfectly true (F. 5)

3. With respect to loss of pension rights, the record shows that when Schoenbohm lost his job at the police department he did, in fact, lose all of his pension rights. His estimate that these rights amounted to at least \$150,000 was a very conservative estimate, and was soundly based. True, when Schoenbohm was subsequently hired by the Virgin Islands government, his pension rights were restored. When he lost the rights, however, he and his family had no way of knowing whether those rights would every be restored. For two years, Schoenbohm had to confront the fact that the rights had been lost and that the loss could well be permanent (F. -7). Thus, the loss of pension rights was a legitimate factor to be taken into account in assessing the suffering already inflicted upon Schoenbohm and his family as a result of his conviction. There was nothing in Schoenbohm's testimony concerning the loss of these rights which was either untrue or less than candid.

4. Finally, with respect to the alleged violation of the

ex parte rule, counsel for Schoenbohm has been unable to find any case in which the Commission has ever revoked or failed to renew a license because of a technical violation of the ex parte rule. In this case, no violation of the rule occurred, because nobody ever attempted to make an improper ex parte presentation on the part of Schoenbohm (F. 8). There was a private conversation between Schoenbohm and a friend, Malcolm Swan, in which Schoenbohm described the ex parte rule to Mr. Swan. In that conversation Schoenbohm told Swan, in substance, that he, Schoenbohm, could not write to politicians or people at the FCC without violating the rule, but that others could do so (F. 8). However, Schoenbohm did not ask Mr. Swan to write to anybody and Mr. Swan did not, in fact, write to anybody (F. 8).

5. Schoenbohm continues to deny that he knowingly violated the ex parte rule. As he explained, he did not know at the time that the ex parte rule also prohibited him from encouraging other people to write to politicians on his behalf (F. 9). If Schoenbohm had know of that portion of the rule, he would not have said what he said to Mr. Swan, lest it be misinterpreted as a solicitation (F. 9). However, Schoenbohm did not intend his conversation with Mr. Swan to be solicitation, and the fact that Swan, a close friend of Schoenbohm, never wrote anybody on Schoenbohm's behalf, fully vindicates Schoenbohm's contention that the conversation was not intended as a solicitation. It is concluded, therefore, that Schoenbohm did not violate the anti-solicitation provisions of the ex parte rule.

B. Issue (c)(2).

6. This issue seeks to determine whether, in a conversation with a fellow amateur, Schoenbohm discussed the use of unauthorized access codes to make long distance telephone calls. The record discloses that the conversation in question had nothing to do with illicit or unauthorized access codes. What actually happened is that Schoenbohm had noticed that some businesses in Tortola in the Virgin Island were advertising that they had local telephone numbers in the U.S. Virgin Islands. Schoenbohm suspected that a gentleman by the name of Ackley was providing these telephone numbers to the Tortola businesses. Ackley had a so-called "YB system", which could be used illegally to transmit signals between the U.S. Virgin Islands and the British Virgin Islands, and to enable merchants in the British Virgin Islands to be reached by calling a local number in the U.S. Virgin Islands (F. 12).

7. During a conversation with two other radio amateurs (one of whom was employed by CALLS), Schoenbohm sought to demonstrate that Ackley's YB system was being used for illegal purposes (F. 11-13). During the conversation, Schoenbohm called a number of these telephone numbers, while listening to the frequencies licensed to Ackley to determine whether calling these numbers would activate Ackley's transmitters. Schoenbohm demonstrated that, in fact, these calls did activate Mr. Ackley's transmitters. Schoenbohm did this to encourage the other amateurs to pursue Ackley's illegal operations. Schoenbohm also wrote a

letter to Riley Hollingsworth at the FCC, specifically complaining about these illegal operations (F. 13).

8. Thus, the conversation which was the subject of Issue (c) (2) had absolutely nothing to do with illicit access codes. The discussion related entirely to ordinary telephone numbers publicly available in published advertisements or known to be part of a block of numbers which have been assigned to Ackley. These numbers were in no way illicit, illegitimate, unauthorized, immoral or fattening. Schoenbohm committed no wrongdoing in calling these numbers and Schoenbohm did not obtain these numbers through any improper means, whatsoever. Therefore, Schoenbohm fully satisfied Issue (c) (2) and that issue must be resolved in his favor.

IV. ULTIMATE CONCLUSIONS.

Schoenbohm has fully satisfied all of the issues designated against him. Therefore, his license must be renewed.

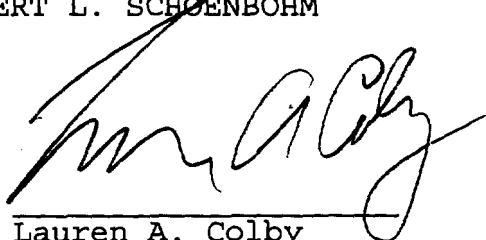
Respectfully submitted,

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May 7, 1997

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By:


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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 7th day of May, 1997:

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